

WO

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States Liability Insurance Company,

Plaintiff,

vs.

Xiangnan Gong, et al.,

Defendants.

No. CV-18-01087-PHX-SPL

ORDER

Plaintiff United States Liability Insurance Company (the “Plaintiff”) initiated this lawsuit against defending parties Xiangnan Gong (“Gong”), Zhuo Zhan Kuang, Jane Doe Kuang,¹ and Healthy Chinese Herbs Company Incorporated seeking a declaratory judgment. (Doc. 1) The Plaintiff moved for summary judgement on declaratory judgment relief (the “Motion”). (Doc. 39) The Motion was fully briefed on December 18, 2018. (Docs. 50, 53, 58, 59) Because it would not assist in resolution of the instant issues, the Court finds the pending motion is suitable for decision without oral argument. See LRCiv. 7.2(f); Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998). The Court’s ruling is as follows.

¹ Jane Doe Kuang is identified as Tina Kuang in a response to the Motion. (Doc. 50 at 1)

1 **I. Background²**

2 Defendant Zhuo Zhan Kuang (“Z.Z. Kuang”) and Jane Doe Kuang operate a
3 health and natural food store named Healthy Chinese Herbs Company, Inc. (“HCHC,”
4 and together with Z.Z. Kuang and Jane Doe Kuang, the “Defendants”). (Doc. 40 at 1–2;
5 Doc. 51 at 2) HCHC sells Chinese herbal medicines, ointments, packaged teas, and
6 herbs. (Doc. 40 at 2) The Plaintiff alleges that Z.Z. Kuang held himself out to be a
7 medical or naturopathic doctor, and Z.Z. Kuang was known as “Doctor Kuang”
8 throughout the Chinese community. (Doc. 40 at 2)

9 A woman named Jie Xu sought out Z.Z. Kuang to receive treatment for neck pain.
10 (Doc. 40 at 2) Z.Z. Kuang “examined and treated Xu at HCHC for neck pain on multiple
11 occasions and prescribed various remedies, herbs, and/or medicines to Xu which were
12 dispensed” by HCHC. (Doc. 40 at 2) Z.Z. Kuang “advised Xu [of] his various remedies,
13 herbs, and/or medicines, asserting the substances would heal and cure her condition” and
14 instructed Xu not to seek out medical care. (Doc. 40 at 2) On May 30, 2017, Xu was
15 found unconscious in her home and transported to the hospital for medical treatment.
16 (Doc. 40 at 3) At the hospital, Xu was diagnosed with severe septic shock with organ
17 failure, among many other ailments, and she died on May 31, 2017. (Doc. 40 at 3) On
18 April 30, 2018, Gong, Xu’s husband, filed an amended complaint against the Defendants
19 in the Maricopa County Superior Court (the “Wrongful Death Lawsuit”), alleging causes
20 of action for negligence per se and fraudulent misrepresentation, among other claims.
21 (Doc. 40 at 1)

22 The Plaintiff issued a Commercial General Liability Policy to HCHC effective
23 August 1, 2016 to August 1, 2017 (the “ Insurance Policy”). (Doc. 40 at 4) The Plaintiff
24 is providing the Defendants with a defense to the Wrongful Death Lawsuit under a
25 reservation of rights, but the Plaintiff initiated this lawsuit seeking a declaratory judgment

26
27 ² Unless otherwise noted, the following facts are undisputed between the parties
28 for the purpose of resolving the Motion. The Court notes the Defendants’ position
denying these facts for the purpose of defending the underlying lawsuit pending before
the Maricopa County Superior Court (CV2018-090449).

1 that it has no duty to defend or indemnify the Defendants for the Wrongful Death
2 Lawsuit pursuant to the terms of the Insurance Policy. (Doc. 40 at 9; Doc. 1)

3 **II. Legal Standard**

4 A court shall grant summary judgment if the pleadings and supporting documents,
5 viewed in the light most favorable to the non-moving party “show that there is no
6 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
7 of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23
8 (1986). Material facts are those facts “that might affect the outcome of the suit under the
9 governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine
10 dispute of material fact arises if “the evidence is such that a reasonable jury could return a
11 verdict for the nonmoving party.” *Id.*

12 The party moving for summary judgment bears the initial burden of informing the
13 court of the basis for its motion and identifying those portions of the record, together with
14 affidavits, which it believes demonstrate the absence of a genuine issue of material fact.
15 *Celotex*, 477 U.S. at 323. If the movant is able to do such, the burden then shifts to the
16 non-movant who, “must do more than simply show that there is some metaphysical doubt
17 as to the material facts,” and instead must “come forward with ‘specific facts showing
18 that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
19 475 U.S. 574, 586–87 (1986).

20 **III. Analysis**

21 **A. Appropriateness of Summary Judgment Ruling**

22 The Plaintiff seeks a declaratory judgment from the Court finding that the
23 Insurance Policy does not require the Plaintiff to defend the Wrongful Death Lawsuit
24 pending against the Defendants. (Doc. 39 at 1) The Defendants and Gong argue that the
25 Motion is premature because Arizona law requires the Court to consider facts not yet
26 developed in discovery in its analysis of whether the Plaintiff has a duty to defend under
27 the Insurance Policy. (Doc. 50 at 4; Doc. 53 at 6–7) In response, the Plaintiff argues
28 (i) that Arizona courts have found that summary judgment is appropriate on the issue of

1 an insurer's duty to defend prior to the conclusion of an underlying case, and
2 (ii) summary judgment is appropriate because there are no genuine issues of material fact
3 between the parties to this case.

4 First, the Court notes that there are no genuine disputes of material fact between
5 the parties. The primary question before the Court is whether the complaint in the
6 Wrongful Death Lawsuit alleges any claim within the Insurance Policy's coverage. The
7 Court notes that the Insurance Policy states that the Plaintiff has "the right and duty to
8 defend the insured against any 'suit'" seeking damages for bodily injury or property
9 damage covered under the Insurance Policy. (Doc. 40-4 at 21) In Arizona, if any claim
10 alleged in the complaint is within the policy's coverage, the insurer has a duty to defend
11 the entire suit, because it is impossible to determine the basis upon which the insurer will
12 recover (if any) until the action is completed." *Nat'l Fire Ins. Co. of Hartford v. James*
13 *River Ins.*, 162 F. Supp. 3d 898, 913 (D. Ariz. 2016) (citing *Nucor Corp. v. Employers*
14 *Ins. Co.*, 296 P.3d 74, 83–84 (Ct. App. 2012)). Furthermore, the interpretation of an
15 insurance contract is a question of law for the Court to decide. *Id.* at 903 (citing *Liristis v.*
16 *Am. Family Mut. Ins. Co.*, 61 P.3d 22, 26 (Ct. App. 2002)).

17 The Court also notes that, in similar cases where an insurer sought a declaratory
18 judgment abdicating its duty to defend an insured party, precedent supports addressing a
19 motion for summary judgment independent of the progress in the underlying lawsuit. See
20 *Nat'l Fire*, 162 F. Supp. 3d at 901–902 (finding that the insurer had a duty to defend the
21 insured even after the underlying case settled); *757BD LLC v. Nat'l Union Fire Ins. Co.*
22 *of Pittsburgh, PA*, 330 F. Supp. 3d 1143, 1148 (D. Ariz. 2018) (stating "Summary
23 judgment is particularly appropriate to resolve questions of insurance coverage, since the
24 interpretation of a written contract is a matter of law to be determined by the court" and
25 upholding an insurer's decision to not defend the insured party prior to the underlying
26 lawsuit's resolution); *Kepner v. W. Fire Ins. Co.*, 509 P.2d 222, 225 (1973) (stating "a
27 testing of the insurer's liability may take the form of a declaratory judgment brought in
28 advance of the third party's action"). Accordingly, the Court finds that it is appropriate

1 to move forward with considering whether summary judgment is warranted at this time.

2 **B. Absolute Professional Liability Exclusion**

3 The “Absolute Professional Liability Exclusion” section of the Insurance Policy
4 states that the Insurance Policy “does not insure against loss or expense, including but not
5 limited to the cost of defense, arising out of or resulting from, . . . the rendering of or
6 failure to render professional services of any kind, or any error or omission, malpractice
7 or mistake in the rendering of professional services of any kind, committed or alleged to
8 have been committed by or on behalf of any insured.” (Doc. 40-4 at 46) The Plaintiff
9 argues that all of the claims set forth in the Wrongful Death Lawsuit arise out of the
10 Defendants’ professional practice of naturopathic medicine, which is explicitly excluded
11 from coverage under the Insurance Policy. (Doc. 39 at 8) In response, the Defendants
12 argue that the Absolute Professional Liability Exclusion does not apply to the majority of
13 the claims in the Wrongful Death Lawsuit because those claims do not arise from the
14 performance of or failure to perform professional services. (Doc. 50 at 8) Gong argues
15 that the Plaintiff does not sufficiently argue that the services at issue provided by the
16 Defendants were professional services under Arizona law. (Doc. 53 at 9)

17 1. Naturopathic Medicine and Professional Services Under Arizona Law

18 Arizona law recognizes naturopathy as a professional practice that generally
19 requires a license. *Thompson v. Thompson*, 2017 WL 6376168, at 2 (Ariz. Ct. App. Dec.
20 14, 2017); *Rastetter v. Weinberger*, 379 F. Supp. 170, 171 (D. Ariz. 1974); *Gates v.*
21 *Kilcrease*, 188 P.2d 247, 250 (1947). Under Arizona law, the practice of naturopathic
22 medicine³ “means a medical system of diagnosing and treating diseases, injuries,
23 ailments, infirmities and other conditions of the human mind and body, including by
24 natural means, drugless methods, drugs, nonsurgical methods, devices, physical,
25 electrical, hygienic and sanitary measures and all forms of physical agents and

26 _____
27 ³ Naturopathic medicine is defined as “medicine as taught in approved schools of
28 naturopathic medicine and in clinical, internship, preceptorship and postdoctoral training
programs approved by the board and practiced by a recipient of a degree of doctor of
naturopathic medicine licensed pursuant to this chapter.” Ariz. Rev. Stat. Ann. § 32-1501.

1 modalities.” Ariz. Rev. Stat. Ann. § 32-1501. The Defendants’ response does not admit
2 that the Defendants participated in the practice of naturopathy; however, the complaint in
3 the Wrongful Death Lawsuit clearly accuses Z.Z. Kuang of representing himself as a
4 naturopathic doctor and “prescribing a substitute for medical care” through the use of
5 “various remedies, herbs, and/or medicines” and substances. (Doc. 40-1 at 3–4)

6 Notably, naturopathic licensing regulations do not apply to “[a] person who is not
7 licensed or certified by the board and who sells food articles to supplement the diet of a
8 person or who sells a natural substance that does not require a prescription.” Ariz. Rev.
9 Stat. Ann. § 32-1521. However, the allegations in the complaint allege that the
10 Defendants’ actions went far beyond simply selling food articles and natural substances,
11 as the complaint alleges that the Defendants took the steps of diagnosing the decedent’s
12 medical condition and prescribed a series of treatments to cure the decedent. (Doc. 40-1
13 at 3–4) Accordingly, the Court finds that the complaint sufficiently alleges that the
14 Defendants provided professional services through the practice of naturopathic medicine.

15 2. Counts 1, 2, 3, 5, and 6

16 Count 1 of the complaint alleges a cause of action for negligence per se arising out
17 of Z.Z. Kuang’s unlicensed practice of naturopathic medicine. (Doc. 40-1 at 6) Count 2
18 of the complaint alleges a cause of action for respondeat superior arising out of Z.Z.
19 Kuang’s actions during the scope of his employment with HCHC. (Doc. 40-1 at 8) Count
20 3 of the complaint alleges a cause of action for negligence arising out of the Defendants’
21 failure to exercise a reasonable duty of care in “providing medical care” to the decedent.
22 (Doc. 40-1 at 8) Count 5 of the complaint alleges a cause of action for fraudulent
23 misrepresentation arising out of Z.Z. Kuang’s performance of naturopathic medical
24 examinations of the decedent. (Doc. 40-1 at 10) Finally, Count 6 of the complaint alleges
25 a cause of action for negligence arising out of representations made by the Defendants
26 assuring the decedent that she should not seek medical care. (Doc. 40-1 at 12)

27 In order to determine whether the Plaintiff has a duty to defend pursuant to the
28 terms of the Insurance Policy, the Court may look at the face of the claims set forth in the

1 complaint to determine whether the alleged claims could possibly be covered by the
2 Insurance Policy. In this case, it is clear to the Court that Counts 1, 2, 3, 5, and 6 of the
3 complaint are directly tied to the Defendants’ alleged unlicensed and improper practice of
4 naturopathic medicine. The allegations in the complaint clearly state that most of the
5 claims arise out the Defendants’ unlawful practice of naturopathic medicine, which is
6 recognized as a professional service under Arizona law. Therefore, the Court finds that
7 the plain terms of the Absolute Professional Liability Exclusion abdicate the Plaintiff of
8 any duty to defend the Defendants in the Wrongful Death Lawsuit. Accordingly, the
9 Court finds that the Plaintiff has no duty to defend the Defendants on Counts 1, 2, 3, 5
10 and 6 of the complaint, and the Motion will be granted as to those claims.

11 **C. Products-Completed Operations Hazard Exception**

12 The “Products-Completed Operations Hazard” section of the Insurance Policy
13 states that the Insurance Policy “does not apply to ‘bodily injury’ or ‘property damage’
14 included within the ‘products-completed operations hazard’”. (Doc. 40-4 at 39)
15 Products-completed operations hazard includes “all ‘bodily injury’ and ‘property
16 damage’ occurring away from premises [owned or rented by the Defendants] and arising
17 out of ‘[the Defendants’] product⁴ or ‘[the Defendants’] work.” (Doc. 40-4 at 35) Count
18 4 of the complaint alleges a cause of action for consumer fraud arising out of the
19 Defendants’ actions in selling their merchandise to the decedent. (Doc. 40-1 at 9)
20 However, the plain terms of the Insurance Policy state that the Insurance Policy does not
21 apply to injuries caused by the Defendants’ products away from the Defendants’ store
22 premises. Count 4 of the complaint explicitly focuses on the deceptive practices used by
23 the Defendants to sell merchandise to the decedent, which allegedly contributed to the
24 decedent’s death. Count 4 also arises out of the Defendants’ role in providing
25 professional services, so the Plaintiff has no duty to defend this claim against the
26 Defendants for the aforementioned reasons. Accordingly, the Court finds that the plain

27 _____
28 ⁴ Product is defined as “any goods or products, other than real property,
manufactured, sold, handled, distributed or disposed of” by the Defendants. (Doc. 40-4 at
35)

1 terms of the Insurance Policy do not cover the claim against the Defendants related to the
2 sale of their merchandise, and the Motion will be granted as to Count 4 of the complaint.

3 **D. Indemnification and Punitive Damages**

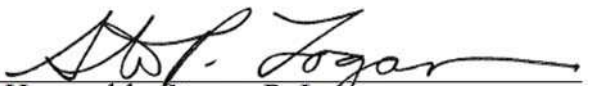
4 The Court agrees with the defending parties that punitive damages are not subject
5 to the Plaintiff's duty to defend the Wrongful Death Lawsuit. (Doc. 50 at 11; Doc. 53 at
6 15) However, the Plaintiff requests for the Court to grant summary judgment on the issue
7 of whether the Plaintiff has a responsibility to indemnify the Defendants for any claims
8 brought in the Wrongful Death Lawsuit, including punitive damages. (Doc. 39 at 14)
9 Under Arizona law, the duty to defend carries a conditional obligation to indemnify until
10 it becomes clear that there can be no recovery within the insuring clause. *Navigators*
11 *Specialty Ins. Co. v. Nationwide Mut. Ins. Co.*, 50 F. Supp. 3d 1186, 1197 (D. Ariz.
12 2014). In this case, it is clear to the Court that there is no potential for liability that
13 arguably comes within the scope of the insurance coverage provided by the Insurance
14 Policy because all of the substantive claims present in the complaint are specifically
15 excluded from the coverage offered by the Insurance Policy.

16 Accordingly,

17 **IT IS ORDERED** that Plaintiff's Motion for Summary Judgment (Doc. 39) is
18 **granted**; and

19 **IT IS FURTHER ORDERED** that the Clerk of Court shall terminate this case
20 and enter judgment accordingly.

21 Dated this 15th day of August, 2019.

22
23
24
25 
26 Honorable Steven P. Logan
27 United States District Judge
28